No. 90-1657

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# Supreme Court of the United States

OCTOBER TERM, 1991

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SUE SUSER, *et al.*,

*Petitioners,*

v.

ARTHUR M., *et al.*,

*Respondents.*

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On Writ of Certiorari to the
United States Court of Appeals
For the Seventh Circuit

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BRIEF OF THE NATIONAL COUNCIL OF
JUVENILE AND FAMILY COURT JUDGES AS
AMICUS CURIAE SUPPORTING RESPONDENTS

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## QUESTIONS PRESENTED

The National Council of Juvenile and Family Court Judges will address the following issues:

1. Whether the full implementation of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, 94 Stat. 500, requires the availability of private causes of action under 42 U.S.C. § 1983.

2. Whether the existence of private causes of action in the federal courts will enmesh federal courts in family and child welfare issues in a manner that interferes with the role of state courts under the Adoption Assistance and Child Welfare Act.

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IN THE

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OCTOBER TERM, 1991

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**No. 90-1488**

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SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

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**On Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit**

---

## BRIEF OF THE NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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### INTEREST OF AMICUS

This brief *amicus curiae* is being filed with the consent of the parties pursuant to Rule 37. Letters of consent are on file with the Clerk. The National Council of Juvenile and Family Court Judges was founded in 1937 and is the oldest national judicial membership organization in the United States. The Council serves as the only national organization constituted of members of state juvenile and family

courts. The Council's current membership encompasses an estimated 2,500 juvenile and family court judges and related juvenile justice professionals.

One of the primary goals of the Council is to offer continuing education for the nation's judiciary. In 1969, the National College of Juvenile and Family Law was established as the Council's training division. Both the Council and the training College are headquartered in the Midby-Byron National Center for Judicial Education on the University of Nevada campus in Reno, Nevada. The research division of the Council is the National Center for Juvenile Justice, located in Pittsburgh, Pennsylvania.

The members of the Council are deeply involved in child welfare issues, both professionally and personally. The implementation of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. 96-272, 94 Stat. 500, ("the AACWA") directly affects the interests of the Council and its members, particularly the judicial members who hear and decide child welfare cases under the provisions of state law and the AACWA. The Council and its members have necessarily acquired extensive practical experience and expertise in administering the provisions of the AACWA and offer a unique perspective on the impact of that Act and the consequences of allowing private causes of action to enforce the AACWA. In July, 1989, the Council adopted a resolution that the AACWA "should be amended to clarify that there is a private cause of action under the Act." *National Council of Juvenile and Family Court Judges*, July, 1989 **Resolution ¶ 9.**

Because the issue in this case is one the Council has already addressed and one which directly affects

its members' collective and individual interests, it has a legitimate interest in the decision by this Court. Because the briefs of the Petitioner and *amici* supporting the petitioner rely, in part, on arguments about the impact of private causes of action on state court judges, the Council believes it would be both appropriate and beneficial for this Court to receive and consider the Council's views.

## SUMMARY OF ARGUMENT

Based on the extensive experience of the Council and its members in deciding cases affected by the AACWA, the Council believes that full and successful implementation of the congressional policies expressed in the AACWA requires the availability of private causes of action under federal law. In accepting federal funds, the legislative and executive branches of our governments have agreed to attempt to insure that the goals and purposes of the AACWA are carried out. Private causes of action can address issues of allocation of state and local resources to determine whether those systemic actions have been adequate. Individualized judicial decisions on "reasonable efforts" to protect a child's interests are necessarily limited in their ability to reach such general issues of resource allocation.

The Council recognizes and supports the primary role of state court judges in adjudicating individual cases under applicable state law and the AACWA. The Council feels, however, that the role of state judges is not threatened or impaired by the existence of a private cause of action under federal law to remedy systemic problems of inadequate implementation of the AACWA. To the contrary, the Council

believes that the existence of such an alternative to individualized determinations is essential if our courts are to be able fully and faithfully to follow the commands of state and federal law. For that reason the Council supports the recognition of private causes of action under the AACWA, in federal court, to decide claims of systemic failure to follow the commands of federal law. Federal judicial decisions on the adequacy of state actions at the systemic level do not threaten the statutory and traditional role of state courts in making judicial determinations in individual cases.

The Council takes no position on whether the existing AACWA should be judicially interpreted to recognize such actions or legislatively amended to permit such actions. The Council believes the Court will be fully advised by the parties and the other *amici* as to the merits of the precise legal issue before it. The Council's interest in this case is in informing the Court that this organization of state court judges who implement the AACWA on a regular basis does not believe that a federal private cause of action interferes with their jurisdiction, but instead believes that such actions are essential to the proper performance of their judicial duties.

## HISTORY OF THE COUNCIL'S ACTIVITY IN PERMANENCY PLANNING

In 1974, the Council first began its efforts to improve judicial review of abused and neglected children. The initial focus was on children already in substitute placements such as foster care homes, or institutional placements. Council members set out to examine the nation's foster care population, find out why children lingered too long in foster care, suffered

through multiple placements, constantly changed social service personnel and were provided inadequate service programs.

The Council called for expanded and increased judicial review of children in placement, and strongly supported allied child welfare organization efforts across the nation to increase "permanency planning" for each dependent child under the jurisdiction of juvenile and family courts. Permanency planning is the term used to characterize efforts to prevent the unnecessary removal of children from their families, or, when safety concerns warrant foster care, to ensure quick family reunification. For children unable to be safely reunited with their families, effective permanency planning serves to identify adoptive placements as quickly as possible.

The Council was a primary source of development and endorsement for the AACWA which was designed to encourage states to re-examine the policies and procedures through which children were removed from their natural families and placed in foster care. Judges nationwide were joined in their focus on permanency planning by social workers, attorneys, state legislators and child advocates who recognized the harmful effects of unnecessary foster care placement and the strong emotional need for permanency in the lives of each abused and neglected child.

The Council enthusiastically endorsed the provisions of the AACWA, and established its Permanency Planning for Children Project in 1980. Funded by both private and government sources, the project was designed to provide training and technical assistance to judges and other professionals engaged in child placement decisions. The project helped to establish Per-

manency Planning Task Forces in most of the 50 states. Each State Task Force was comprised of judges, social service agency personnel, legislators, attorneys, child advocates, citizen volunteers and others engaged in child welfare issues.

## ARGUMENT

### I. THE AACWA CANNOT BE ADEQUATELY IMPLEMENTED WITHOUT PROVISION OF PRIVATE CAUSES OF ACTION EITHER TO REMEDY SYSTEMIC FAILURES TO ALLOCATE RESOURCES OR TO TAKE APPROPRIATE ADMINISTRATIVE STEPS TO ATTAIN COMPLIANCE

During the early phases of the Council's Permanency Planning Project, it was quickly concluded that increased review and monitoring of abused and neglected children would not be possible without increased community resources. While there have indeed been notable permanency planning achievements in jurisdictions throughout our nation, the successes are overshadowed by the failure of the Act to be fully implemented in many of the 50 states. Although the Act's requirements concerning regular judicial review of abused and neglected children have promulgated new interaction and cooperation between courts and social service agencies, the "reasonable efforts" provision of the Act remains inappropriately and inadequately implemented. This failure to fully implement the Act can be attributed, first, to initial confusion regarding its provisions, and, secondly, to the inadequacy of government's response to the crisis-level increase in the number and complexity of abuse and neglect cases coming to the attention of agencies and state court systems.

Among the substantive reforms contained in the Act was a requirement that states develop written case plans for each child in federally reimbursed and state-supervised foster care. This case plan is required to promote placement of each child in the least restrictive setting, in close proximity to the natural parent's residence, consistent with the best interests and special needs of the child. 42 U.S.C. § 675.(5)(A). Since 1983, the Act has required state judges to determine whether "reasonable efforts" have been made to enable children to remain safely at home and to avoid unnecessary foster care. 42 U.S.C. § 671(a)(15)(A). The Act also requires that reasonable efforts be made to reunite foster children with their biological parents. 42 U.S.C. § 671(a)(15)(B).

The nation's juvenile and family court judiciary must, on a consistent and continuing basis, determine whether "reasonable efforts" were provided by the agency to prevent the necessity for foster care placement of each child; or, in cases in which a substantial risk of harm to the child makes placement unavoidable, to rehabilitate and reunify each child's family. This burden is a heavy one, and it is one which the juvenile and family court judiciary cannot shoulder without assistance.

### A. As a Consequence of Multiple Failures of Government, Juvenile and Family Court Judges Remain Unable to Fulfill Judicial Responsibilities Under the Act

The well-intentioned designers of the AACWA intended to rechannel government attention and resources to avoid unnecessary foster care and to preserve families. As noted in a 1984 federal study, the Act "was designed to remove barriers to permanency based in previous federal policy by creating

a system of fiscal incentives and programmatic safeguards that would promote the achievement of three major goals: 1) to prevent unnecessary entry into foster care; 2) to improve the quality, extend the range, and increase the coordination of services to children and their families; and 3) to promote timely reunification of families in which the child's entry into foster care is unavoidable, or assure in other ways, such as adoption, the child's permanent status in a protected family setting." 1 R.T. Yoshikami, *et al., Assessing the Implementation of Federal Policy to Reduce the Use of Foster Care*, Children's Bureau, Administration for Children, Youth and Families, Office of Human Development Services, Dept. of Health and Human Services, 2 (1984).

Despite initial optimism in state-by-state implementation of the law, both state child welfare agencies and juvenile and family court systems encountered difficulty in complying with its provisions. Administrative and judicial response to the Act has not been uniform across states. "The state judicial response to the requirements of [the AACWA] varies dramatically from jurisdiction to jurisdiction. . . . State statutory changes for the most part were consistent not necessarily with the intent of the Act, but with the manner in which the [statutory] audits were focused. For example, . . . the audit questions whether there has been a judicial finding of reasonable efforts. States assumed that one finding of reasonable efforts was sufficient [to obtain federal] dollars, [and thus] passed statutes or promulgated regulations requiring a judicial finding of reasonable efforts prior to a child's removal or commitment." *Innovative Child Welfare Services Programs Designed to Preserve Families:*

*Hearings Before the Subcomm. on Human Resources of The House Comm. on Ways and Means*, 102nd Cong., 1st Sess. 64 (1991) (statement of R.J. Fitz-Gerald, Family Court Judge, Jefferson District Court, Louisville, Kentucky) (*hearings have been submitted to GPO for printing*).

**B. There Are Continuing and Increasing Barriers to Progress In Achieving Full and Faithful Compliance with the Congressional Mandates**

Several states have made rapid and successful systemic improvements toward compliance with the Act. Yet the nation's social service and child welfare sectors remain, for the most part, unable to effectively implement the Act due to overburdened personnel and under-funded service programs. Estimates of the number of abused and neglected children in need of family preservation services continue to climb, and the number of children already in government care who need family reunification services is also increasing.

"In 1977, an estimated 502,000 children were in foster care. By 1980 this number had dropped to 302,000, and it declined further to a low of 275,000 in 1983. During the mid-1980s, however, estimates of the number of children in foster care began to increase reaching approximately 340,000 by the end of 1989. Recent projections estimate that 550,000 children will be in foster care by 1995." National Commission on Children, *Final Report, Beyond Rhetoric: A New American Agenda for Children and Families* 283-84 (1991).

Juvenile and family courts increasingly are overburdened with crowded court dockets and no increase in resources to permit adequate compliance with the

Act's requirements. "The nationally noted upsurge in substance abuse also has served to increase burdens on our nation's juvenile and family court systems. Substance abuse is an element that is present in most dependency cases. Both courts and social service agencies now are struggling with how to evaluate risks to children of substance-abusing families, and identify the family preservation service needs of drug-exposed mothers and infants." *Federally Funded Child Welfare, Foster Care, and Adoption Assistance Programs: Hearings Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 101st Cong., 2nd Sess. 249 (1990)(statement of W.D. Reader, Senior Judge, Stark County Family Court, Canton, Ohio).

In response, Council members and consultants have developed a new, advisory protocol to assist judges confronted by drug and other substance abuse-related issues. "Such a redefinition is necessary because our service system has not previously been constructed to deal with mothers and children with substance abuse problems. New and different types of family-focused services have been created that are both effective and economical. These promising, new, family-centered programs feature a multi-disciplinary approach and early intervention with families. . . . The preservation of one family of one drug-exposed infant can help to ensure the health and safety of present and future siblings, and possibly, future generations. When this can be done for less cost than would otherwise be incurred for the unnecessary dissolution of the family, it makes a compelling case for expansion of such efforts." *Protocol for Making Reasonable Efforts in Drug-Related Dependency Cases*, National

Council of Juvenile and Family Court Judges 3 (1991) (prepublication draft).

The increased demands on juvenile and family court calendars for expanded hearings on increasingly complex abuse and neglect matters, as well as the increase in the number of hearings promulgated by the Act, have strained judicial resources to the limit. Federal researchers have found that this overburdening of the court system has led children whose families cannot be rehabilitated and reunited to continue to be denied the opportunity for a permanent adoptive placement. "Scheduling and conducting court hearings delay implementation of adoption plans. Delays most frequently result from interruptions of proceedings for other civil matters, crowded court dockets, and inability to coordinate the schedules of a variety of hearing participants." R. Kusserow, *Barriers to Freeing Children for Adoption*, ii (1991).

The HHS adoption study recommended that, "[s]tate governments should . . . provide adequate resources to enable State courts to hear and rule on child dependency cases in a timely manner; and offer increased training on permanency planning, in general, and on termination of parental rights, in particular, for child welfare staff, judges, public attorneys, and the staffs of contractual service providers." Kusserow, *supra*, at iii.

**C. The Size and Scope of the Problems are Increasing**

The child welfare system continues to experience dramatic increases in child abuse or neglect referrals. "Nationwide, child abuse reports increased 31% during the period 1985-1990. During the period 1989-90, an estimated 2,508,000 children were reported to child

protection service agencies as victims of child mistreatment or about 39 out of every 1,000 U.S. Children. The numbers indicate a steady growth in child abuse reports throughout the second half of the 1980s, with annual increases averaging around 5% since 1985." D. Daro and K. McCurdy, *Current Trends in Child Abuse Reporting and Fatalities: The Results of The 1990 Annual Fifty-State Survey*, National Committee for the Prevention of Child Abuse 3 (1991).

The continuing increases in the complexity and severity of abuse and neglect matters have led many juvenile and family court judges to conclude that the amount and quality of social services being offered to children and their families remains inadequate.

The increased review responsibilities and resultant administrative tasks which the AACWA requires of juvenile and family court judges are taxing already overburdened people and systems. The gatekeepers of our nation's foster care system are its juvenile judges. It is state judges who must ultimately decide whether a family in crisis will be broken apart and children placed in foster care or whether placement can be safely prevented through the reasonable efforts of our social service system. If reasonable efforts to preserve or reunify families are not evaluated and ensured through effective judicial review, then families and children are unnecessarily harmed.

### D. Private Causes of Action Are Effective Tools for Implementing Statutory Programs Like the AACWA

Given conflicting priorities, it has unfortunately been true that many states have adopted limited programs instead of allocating sufficient resources to faithfully implement the intent of Congress in passing

the AACWA. The private cause of action under federal law is an indispensable tool which serves to assist the nation's juvenile and family court judiciary in the appropriate and just application of the provisions of the AACWA. Such private actions have shown themselves to be an effective and often indispensable means of spurring legislative and executive bodies into more effective implementation of federally-mandated social reforms.

The practical consequence of allowing a private cause of action is to provide incomparable aid to juvenile and family court attempts to ensure "reasonable efforts" to prevent inappropriate foster care, and to speed the reunification of families. The practical consequence of disallowing a private cause of action would be to weaken the AACWA, leaving those children and families who have not been provided with reasonable social service efforts to often ineffective case-by-case review of individual agency decisions.

Federal courts have often been called upon to decide whether state governments are complying with federal social programs. The decisions of this Court that have recognized the existence of private causes of action under a variety of federal statutes have established a body of precedent that has been effectively used by counsel for beneficiaries of federal programs to obtain their statutorily-mandated benefits. The realities of diminishing government resources and entrenched administrative practices have often meant that the only effective tool for obtaining compliance has been the private cause of action in which a federal judge is asked to review systemic problems and take appropriate action to obtain compliance with congressional mandates. While some would argue that it is

preferable to avoid such federal judicial involvement with state activities, our federal system recognizes and enforces the supremacy of federal law and state judges have adjusted to the involvement of the federal judiciary in obtaining compliance with law.

In assessing the necessity for private causes of action, it should be noted that the beneficiaries of the AACWA—neglected and abused children—are among the least politically powerful segments of our society. Unable to participate directly in the political process, children depend upon the efforts of their parents, guardians, friends and counsel for effective implementation of their legal rights. The Council strongly believes that those rights require the presence of a federal private cause of action to maximize the possibility that these children will be treated as Congress intended.

The Council believes that the existence of a judicially-enforceable private action to assure compliance with the "reasonable efforts" provision of the AACWA will prompt improvements in the range and availability of family preservation services. Services to ensure the safety of children within their own families will receive new attention. There will be an increase in the level of cooperation between disciplines, including the judiciary, social service agencies, attorneys and child welfare advocates. The number of unnecessary out-of-home placements will be reduced, ensuring that as many children as possible have stable, caring families not only during their early years but for a lifetime.

There are limits on what individual judges and individual jurisdictions can hope to achieve. Court rulings of non-compliance in individual cases have little,

if any, systemic effect on social service agency administration of abuse and neglect cases. The private cause of action is an indispensable tool to increase compliance with provisions of the Act.

## II. A PRIVATE CAUSE OF ACTION FOR SYSTEMIC FAILURES WILL NOT INTERFERE WITH THE ROLE OF STATE JUDGES

Several of the briefs filed in this case argue that the recognition of a federal private cause of action will improperly interfere with the role of state judges in adjudicating individual cases under applicable state law. Those briefs also argue that Congress intended that the judicial implementation of the AACWA would rest with state, not federal, judges and stress that federal courts have historically declined to take jurisdiction in domestic relations or family law matters. *See* Brief for the Petitioners at 32-33, Brief of the United States as *Amicus Curiae* at 22-26, Brief of the States as *Amicus Curiae* at 11-13. The Council submits that those arguments are misplaced and rest on a fundamentally flawed understanding of the limits of a federal court action in implementing the AACWA.

The Council endorses the recognition of a federal private cause of action to remedy systemic problems such as those at issue in this case. That endorsement does not, however, mean that the federal courts would take over the state courts' responsibility for adjudicating individual cases. The Council would draw a distinction between private causes of action seeking redress for programmatic deficiencies and such actions that seek only to review individual placement or care decisions. This Court is perfectly capable of fashioning a judicial remedy that meets the needs of the system without improper federal exercise of state

court functions. Existing doctrines of abstention or primary jurisdiction can, we believe, be readily adapted to direct the federal courts in the proper direction.

If, as the petitioners contend at page 38 of their brief, some lower federal courts have failed to recognize proper bounds of their authority and have failed to abstain from involvement in particularized determinations of "reasonable efforts," this Court can use this case not only to recognize the existence of a private cause of action under existing law, but to outline the proper limits of that action. This Court's experience in adjudicating delicate issues of federalism has led to a continuing development of principles of abstention and primary jurisdiction. *See, e.g., Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971) (federal courts should abstain from enjoining ongoing state criminal prosecutions); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975) (federal courts should abstain from enjoining civil nuisance proceedings); *Penzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987) (federal court should have abstained from interferring in issues of adequate bond pending appeal in a civil case). The general principle, as most recently stated by this Court, is that federal courts should abstain from interfering with state judicial proceedings "involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *New Orleans Public Serv. v. Council of New Orleans*, 491 U.S. 350, 368, 109 S.Ct. 2506, 2518, 105 L.Ed.2d 298, 317 (1989). Since individual child welfare determinations are uniquely appropriate for state, not federal, judicial determination,

existing principles dictate that any private enforcement action under 42 U.S.C. § 1983 not extend to federal judicial oversight of state court determinations in specific cases.

The Council does not see any unacceptable interference in state judicial functions from federal judicial oversight of systemic issues of compliance with the mandates of the AACWA. Decisions on the adequacy of state regulatory systems, general plans and allocations of resources do not threaten judicial determinations in individual cases. This Court's historical reluctance to involve the federal judiciary in domestic relations matters, *see, e.g., Barber v. Barber*, 62 U.S. (21 How.) 582, 16 L.Ed. 226 (1859), does not necessitate a wholesale abdication of a federal judicial role in implementing the AACWA simply because the Act deals with family law matters. Effective implementation of federal statutes is an entirely proper concern of federal courts. Indeed it would be unusual for federal courts to abandon the field of federal statutory interpretation just because a statute touches an area of family law.

We do not question the wisdom of decisions such as *Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988), where this Court decided a federal court should not determine the validity of two conflicting custody decrees under the authority of a federal statute. The issue in that case was one of individualized determinations based on state law. The Council recognizes that such individualized decisions are indeed the proper province of the state judiciary and we seek no change in that established limit on federal jurisdiction. At the same time, the Council believes that statewide issues of compliance

with a federal statute are problems beyond the proper role of a local state court judge, which are more properly addressed to a federal judge with broader authority and experience. Juvenile and domestic relations judges are well-versed in family law issues and are the proper primary judicial authority in that field. Those same judges are not as experienced in broad issues of federal statutory construction and the difficult and delicate issues raised when a court is asked to order a state agency to comply with federal law.

It may be that the line between proper and improper use of federal judicial power under the AACWA is not now a bright and clear one. It may be that the proper allocation of state and federal judicial functions cannot presently be defined with absolute precision. That problem, inherent in all adjudication of new issues, should not lead to an abandonment of a federal judicial role. It should instead lead to a reasoned decision that considers all aspects of the problem and announces guidelines that reflect an appropriate balance of state and federal expertise.

## III. THE COUNCIL TAKES NO POSITION ON WHETHER THE AACWA IN ITS PRESENT FORM CREATES A PRIVATE CAUSE OF ACTION

We noted at the outset that the 1989 Council Resolution calls for the amendment of the AACWA "to clarify that there is a private cause of action" under the AACWA. The Council as a matter of policy strongly endorses the recognition of such a cause of action as to systemic issues of compliance. The Council strongly believes that the early recognition of such a cause of action would significantly improve implementation of the AACWA and significantly benefit the thousands of children who are the Act's intended

beneficiaries. The Council does not, however, seek to advise this Court on the legal issue of interpreting the existing statute. That task is, we recognize, properly a judicial function to be guided and affected by the Court's own research and experience and the briefs of the parties. The Council seeks only to inform this Court of its strongly-held views of what legal structure it believes would best serve the interests of the children as well as the state judiciary. If the attainment of that goal is properly reached by interpretation of the existing statute, the Council would obviously welcome that result. If, on the other hand, this Court concludes that the legal and policy arguments advanced in support of the recognition of a federal cause of action are more properly addressed to the Congress, the Council is prepared to continue its involvement in seeking legislative action consistent with its goals and the welfare of the individuals whose rights are at stake.

## CONCLUSION

Implementation of the AACWA will be strengthened by recognition of a federal private cause of action. The ability of the state courts to best serve the needs of children will be enhanced by the recognition of such a right. This Court has the ability to fashion appropriate guidance for limiting federal judicial intervention to systemic issues, leaving to the state judiciary individualized determinations. In deciding whether the AACWA as it now exists authorizes such a private cause of action, the Council asks only that this Court understand that not all state judges who are significantly governed by the provisions of the AACWA fear or oppose recognition of such a private

right, but instead see it as a positive addition to the resources available to insure compliance with law and service to the needs of the individuals who appear before our courts.

Respectfully submitted,

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